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MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

_____ Term, _____

No. 74-110

EDMOND PFOTZER and E. JOHN PFOTZER, Individually and as co-partners doing business as E. & E. J. Pfotzer,

Petitioners,

~~DORR-OLIVER, INC.; HOWARD DEAN;~~ ~~DONALD J. ST. JOHN;~~ MICHAEL WARHOLIC; and THE CITY OF NORWALK,

Respondents,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

EDMOND PFOTZER
and
E. JOHN PFOTZER
Petitioners pro se

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TABLE OF CONTENTS

	Page
PETITION	1
OPINION BELOW	2
JURISDICTION	2
ISSUES PRESENTED	2
STATUTES INVOLVED	3
STATEMENT	7
REASONS FOR GRANTING THE WRIT	15
ARGUMENT	15
POINT I — PETITIONERS' 42 U.S.C. 1983 COMPLAINT SEEKING INJUNCTION AGAINST ENFORCEMENT OF STATE STATUTES OF STATE-WIDE APPLICATION, WHERE NO DOUBTFUL QUESTION OF STATE LAW WAS INVOLVED, PRESENTED A SUBSTANTIAL FEDERAL CONSTITUTIONAL QUESTION AND MANDATED CONVENING A THREE-JUDGE DISTRICT COURT PANEL.	15
POINT II — THE SINGLE DISTRICT COURT JUDGE EXCEEDED HIS AUTHORIZED JURISDICTION IN DENYING PETITIONERS' MOTION FOR INTERLOCUTORY INJUNCTION ENJOINING ENFORCEMENT OF STATE STATUTE OF STATEWIDE APPLICATION.	20
CONCLUSION	21
CASES	
EX PARTE FAHEY (1947), 332 U.S. 258	15, 16

Page

IDLEWILD LIQUOR CORP V. EPSTEIN (1962), 370 U.S. 713 16
MITCHUM V. FOSTER (1972) 407 U.S. 225 17
LYNCH V. HOUSEHOLD FINANCE (D.C. CONN. 1973 ____F.S.____, 405 U.S. 538 ..... 11, 14, 18
FARLEY V. FARLEY (3 CIR. 1973), _____F.S._____ 19
HANNIS DISTILLING CO. V. CITY OF BALTIMORE (1910) 216 U.S. 285, 288 19
STRATTON V. ST. LOUIS S.W. RY (1930), 282, U.S. 10, 15, 18 ... 20
FUENTES V. SHEVIN (1972) 407 U.S. 67, 80-82 18

STATUTES

CONN. GENERAL STATUTES:
SEC. 52-263 .....
SEC. 52-279 ..... iv, 3
SEC. 52-280 ..... v, 4
SEC. 52-281 ..... v, 4
SEC. 52-304 ..... vi, 5
SEC. 52-329 ..... vi, 5

U. S. CONSTITUTION .....

AMENDMENT 14 - SECTION 1 ..... vii, 6

Page

U. S. C. .....
28 U. S. C. 1343 - See Appendix, 92a* .....
28 U. S. C. 2201 - See Appendix, 92a .....
28 U. S. C. 2202 - See Appendix, 92a .....
28 U. S. C. 2281 - See Appendix, 93a .....
28 U. S. C. 2282 - See Appendix, 93a .....
28 U. S. C. 1983 - See Appendix, 95a .....

* Appendix page references with "a" are references to Second Circuit Appendix, filed herewith.

Page
3

STATUTES INVOLVED

Connecticut General Statutes:

"Sec. 52-279. When attachments may be granted. Attachments may be granted upon all complaints containing a money demand against the estate of the defendant, both real and personal, and for want thereof against his body; provided no attachment shall be granted against the body in any tort action unless it is within the provisions of section 52-562, nor in any action unless execution against the body may issue therein, nor unless each cause of action in the complaint is such that execution may issue against the body of the defendant upon a judgment founded thereon. No attachment shall be made in any action for slander, libel or invasion of privacy except upon order of the court to which the writ is made returnable. No attachment shall be made against the real or personal property of any municipal official in any action against the municipality or its officials acting within the scope of their authority except upon order of the court to which the writ is returnable. No attachment shall be made against the real or personal property of a member of the state of any municipal police force in an action involving his conduct as a policeman except (1) when such policeman has been dismissed from the police force of which he was a member at the time of the incident which gave rise to the action or (2) upon order of the court to which the writ is returnable. No attachment shall be made against the real or personal property of any member, teacher

or employee, as defined by section 10-235, of any board of education, in any action against any board or commission as defined by said section or against any such member, teacher or employee involving his conduct as such member, teacher or employee, except upon order of the court to which the writ is returnable. (1967, P.A. 275, Sec. 2; 1967, P.A. 679; 1967, P.A. 837; 1969, P.A. 505.)"

"Sec. 52-280. Service of writ of attachment. A writ of attachment shall be served by attaching the estate of the defendant, personal or real, or both, and, if none can be found by attaching his person when liable to attachment. When the body of the defendant is attached, the officer shall read the writ and complaint in his hearing; and, in every case of attachment, the officer serving the process shall leave the person whose estate or body was attached, or at his usual place of abode, if within the state, a true and attested copy of the process and of the accompanying complaint, and of his return thereon, describing any estate attached. (1949 Rev., Sec. 8023.)"

"Sec. 52-281. Order for attachment on plaintiff's application during pendency of action. The plaintiff in any action which was or might have been commenced by attachment may, at any time during its pendency, apply in writing to the court to which it was brought, or, when such court is not in session, to any

judge thereof, for an order for the attachment or further attachment of the estate of the defendant; and the court or judge may, at its or his discretion, issue such an order, directed to a proper officer, stating the amount to be attached, and the time of return, which shall not be later than during the next term or session of such court; which order shall be served and returned in the same manner as an original writ of attachment and when returned shall become a part of the files and record in the action. The estate attached under such order shall be held to respond to the final judgment or decree in the same manner as if attached at the commencement of the action. (1949, Sec. 8069; 1959, P.A. 28, Sec. 179.)"

"Sec. 52-304. Dissolution of attachment by substituting bond or lien. When any estate is attached, or any debt or effects taken by process of foreign attachment, the defendant may apply in writing to the court in which such action may be pending, or any judge thereof, to dissolve the attachment lien upon the substitution of (a) a bond with surety; or (b) a lien on any other property of the defendant which has an equal or greater net equity value than the amount secured by such attachment. (1961, P.A. 517, Sec. 1.)"

"Sec. 52-329. Process of foreign attachment. When the effects of the defendant in any civil action in which a judgment or decree for the payment of money may be rendered are concealed in the hands of his agent or trustee so

that they cannot be found or attached, or when a debt is due from any person to such defendant, or when any debt, legacy or distributive share is or may become due to such defendant from the estate of any deceased person or insolvent debtor, the plaintiff may insert in his writ a direction to the officer to leave a true and attested copy thereof and of the accompanying complaint, at least twelve days in the case of the superior court or the court of common pleas, or six days in the case of the circuit court, before the session of the court to which it is returnable, with such agent, trustee or debtor of the defendant, or, as the case may be with the executor, administrator or trustee of such estate, or at the usual place of abode of such garnishee; and from the time of leaving such copy all the effects of the defendant in the hands of any such garnishee, and any debt due from any such garnishee to the defendant, and any debt, legacy or distributive share, due or that may become due to him from such executor, administrator or trustee in insolvency, not exempt from execution, shall be secured in the hands of such garnishee to pay such judgment as the plaintiff may recover. (1961, P.A. 280.)"

U. S. Constitution:

Amendment 14. Section 1.
(Citizenship - Due process of law - Equal Protection.)... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor

Page

deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. 1343 - See Appendix, 92a.
28 U.S.C. 2201 - See Appendix, 92a.
28 U.S.C. 2202 - See Appendix, 92a.
28 U.S.C. 2281 - See Appendix, 93a.
28 U.S.C. 2284 - See Appendix, 93a.
42 U.S.C. 1983 - See Appendix, 95a.

APPENDIX

JUDGEMENT APPEALED FROM SECOND CIRCUIT 1A

SUPREME COURT OF THE UNITED STATES

_____Term,_____

No. _____

EDMOND PFOTZER and E. JOHN PFOTZER, Individually and as co-partners doing business as E. & E. J. Pfotzer,

Petitioners,

DORR-OLIVER, INC.; HOWARD DEAN; DONALD J. ST. JOHN; MICHAEL WARHOLIC; and THE CITY OF NORWALK,

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Petitioners Edmond Pfotzer and E. John Pfotzer respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on May 14, 1974.

OPINION BELOW

No opinion was rendered by the Court of Appeals. The opinions of the District Court, unreported, appear in the Appendix below, at 6a and 13a, filed herewith.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on May 14, 1974. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

ISSUES PRESENTED

1. Does a single U.S. District Court Judge lack jurisdiction to dismiss, or exceed his authorized jurisdiction in dismissing, a complaint seeking to enjoin, as repugnant to the U.S. Constitution, a State statute of statewide application ?

2. Does a single U.S. District Court Judge exceed his authorized jurisdiction in not granting a motion to convene a three-judge District Court panel to hear a complaint seeking to enjoin enforcement of state statutes of statewide application, where there is no doubtful question of state law involved?

3. Does a single District Court Judge lack jurisdiction to deny interlocutory injunction enjoining enforcement of a state statute of statewide application?

4. Is a complaint dismissible which seeks to declare a state statute of state-wide application repugnant to the U. S. Constitution?

STATUTES INVOLVED

Connecticut General Statutes:

"Sec. 52-279. When attachments may be granted. Attachments may be granted upon all complaints containing a money demand against the estate of the defendant, both real and personal, and for want thereof against his body; provided no attachment shall be granted against the body in any tort action unless it is within the provisions of section 52-572, nor in any action unless execution against the body may issue therein, nor unless each cause of action in the complaint is such that execution may issue against the body of the defendant upon a judgment founded thereon. No attachment shall be made in any action for slander, libel or invasion of privacy except upon order of the court to which the writ is made returnable. No attachment shall be made against the real or personal property of any municipal official in any action against the municipality or its officials acting within the scope of their authority except upon order of the court to which the writ is returnable. No attachment shall be made against the real or personal property of a member of the state or any municipal police force in an action involving his conduct as a policeman except (1) when such policeman has been dismissed from the police force of which he was a member at the time of the incident which gave rise to the action or (2) upon order of the court to

which the writ is returnable. No attachment shall be made against the real or personal property of any member, teacher or employee, as defined by section 10-235, of any board of education, in any action against any board or commission as defined by said section or against any such member, teacher or employee involving his conduct as such member, teacher or employee, except upon order of the court to which the writ is returnable. (1967, P.A. 275, Sec. 2; 1967, P.A. 679; 1967, P.A. 837; 1969, P.A. 505.)"

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"Sec. 52-281. Order for attachment on plaintiff's application during pendency of action. The plaintiff in any action which was or might have been commenced by attachment may, at any time during its pendency, apply in writing to the court to which it was brought, or, when such court is not in session, to any judge thereof, for an order for the attachment or further attachment of the estate of

the defendant; and the court or judge may, at its or his discretion, issue such an order, directed to a proper officer, stating the amount to be attached, and the time of return, which shall not be later than during the next term or session of such court; which order shall be served and returned in the same manner as an original writ of attachment and when returned shall become a part of the files and record in the action. The estate attached under such order shall be held to respond to the final judgment or decree in the same manner as if attached at the commencement of the action. (1949, Sec. 8069; 1959, P.A. 28, Sec. 179.)"

"Sec. 52-304. Dissolution of attachment by substituting bond or lien. When any estate is attached, or any debt or effects taken by process of foreign attachment, the defendant may apply in writing to the court in which such action may be pending, or any judge thereof, to dissolve the attachment lien upon the substitution of (a) a bond with surety; or (b) a lien on any other property of the defendant which has an equal or greater net equity value than the amount secured by such attachment. (1961, P.A. 517, Sec. 1.)"

"Sec. 52-329. Process of foreign attachment. When the effects of the defendant in any civil action in which a judgment or decree for the payment of money may be rendered are concealed in the hands of his agent or trustee so that they cannot be found or attached, or when a debt is due from any person to such defendant, or when any debt, legacy or distributive share is or may become due to such defendant from the estate of

any deceased person or insolvent debtor, the plaintiff may insert in his writ a direction to the officer to leave a true and attested copy thereof and of the accompanying complaint, at least twelve days in the case of the superior court or the court of common pleas, or six days in the case of the circuit court, before the session of the court to which it is returnable, with such agent, trustee or debtor of the defendant, or, as the case may be with the executor, administrator or trustee of such estate, or at the usual place of abode of such garnishee; and from the time of leaving such copy all the effects of the defendant in the hands of any such garnishee, and any debt due from any such garnishee to the defendant, and any debt, legacy or distributive share, due or that may become due to him from such executor, administrator or trustee in insolvency, not exempt from execution, shall be secured in the hands of such garnishee to pay such judgment as the plaintiff may recover. (1961, P.A. 280.)"

U. S. Constitution:

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28 U.S.C. 1343 - See Appendix, 92a.*
28 U.S.C. 2201 - See Appendix, 92a.
28 U.S.C. 2202 - See Appendix, 92a.
28 U.S.C. 2281 - See Appendix, 93a.
28 U.S.C. 2284 - See Appendix, 93a.
42 U.S.C. 1983 - See Appendix, 95a.

STATEMENT

District Court jurisdiction derived from the 14th Amendment, 42 U.S.C. 1983, 28 U.S.C. 1343, 2201, 2202, 2281 and 2284.

On September 1, 1972, petitioners filed their initial complaint (2a, 25a) in the U. S. District Court for the District of Connecticut (Pfotzer v. Dorr-Oliver, Inc. et al., Civil No. B-587), superseded by their First Amended Complaint, filed (prior to Answer by defendants) October 30, 1972 (3a, 16a).

The Amended Complaint sought:

1. declaratory and injunctive relief pursuant to 42 U.S.C. 1983 and the 14th Amendment (par. 1, 16a) and per 28 U.S.C. 2201 and 2202 (par. 4, 17a);

2. determination of the action by a three-judge district court, pursuant to 28 U.S.C. 2281 and 2284 (par. 3, 16a-17a);

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* "a" references are to pages of Second Circuit Appendix, filed herewith.

3. injunction restraining defendants, including one defendant who is a state officer performing a state function from applying, enforcing and executing Sections 52-279, 52-280, 52-281, 52-329 and 52-304 of the General Statutes of the State of Connecticut on the ground that they violate the due process and equal protection provisions of the 14th Amendment (par. 3, 16a-17a);

4. declaratory judgment declaring Sections 52-279, 52-280, 52-281 and 52-304 of the Connecticut General Statutes are unconstitutional facially and as applied, and are in violation of the due process and equal protection provisions of the 14th Amendment (par. 4, 17a).

The complaint* set out that:

Defendant** Dorr-Oliver, Inc., had sued the petitioners herein in a state court action (Dorr-Oliver, Inc., v. Edmond Pfotzer and E. John Pfotzer, Superior Court, Connecticut (Stamford), Docket No. 17,975) (Complaint, par. 6; 18a), and that, prior to the institution of the said action, Dorr-Oliver, Inc., attempted to garnish the sum of about $22,000.00 ostensibly in the hands of the defendant City of Norwalk, which was funds ostensibly owed to petitioners by the City of

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* All future references to "Complaint" will mean the First Amended Complaint.

** All future references to "Defendant" will be reference to defendants in the District Court Action (B-587).

Norwalk for work performed under a contract. (Complaint, par. 10; 18a);

The garnishment was executed by a state officer, defendant Michael Warholic, a Deputy Sheriff of Fairfield County, Connecticut, and was issued prior to commencement of the action by defendant Howard Dean*, attorney for defendant Dorr-Oliver, Inc., in his capacity, ex-officio**, as a Commissioner of the Superior Court of the State of Connecticut (Complaint, par. 8; 18a);

The said garnishment was issued and executed prior to the commencement of the state court litigation (Complaint, par. 12; 19a);

As a result of said attempted garnishment on the City of Norwalk, the said City of Norwalk ostensibly withheld approximate sum of $22,000.00 due to petitioners for performance of a contract with the said City of Norwalk, the said sum being withheld ostensibly from petitioners since November 30, 1971

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* Defendant Donald J. St. John was later substituted as attorney for Dorr-Oliver, Inc., in the place and stead of Defendant Howard Dean (Complaint, par. 9, 18a).

** It appears that, in Connecticut, a licensed attorney was authorized to issue a pre-litigation writ of attachment as a Commissioner of the Superior Court under now judicially void Gen. Stat. Sec. 52-329.

(Complaint, par. 14, 15; 19a-20a)*;

The said garnishment was obtained under the provisions of Connecticut General Statutes, Sec. 52-329, which permitted a pre-litigation attachment to be issued by the attorney for the plaintiff, without requiring a court order or any other additional judicial sanction or intervention

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* It is significant to note that on November 30th, 1969, the date of service of attachment upon defendant herein, City of Norwalk, the City had in fact, upon October 20th, 1969, in answer to plaintiffs' complaint in Civ. No. 13326 filed in the U. S. D. C. for the State of Connecticut, denied it owed plaintiffs money, and contrariwise asserted a counter-claim of $110,000.00. Such specific denial to the Court rendered void (futile) the November 30th, 1969, attachment supra, served upon the City. The City, at all times material to its withholding of plaintiffs $22,000.00, supra, knew in truth, after its October 20th, 1969 denial, that it could not satisfy said garnishment, supra. The record shows the defendant City of Norwalk affirmatively avoided disclosing to the Superior Court of Connecticut (p. 5 supra) its denial of plaintiffs' claims in Civ. 13326 supra and its $110,000.00 counter-claim therein.

(Complaint, par. 11, 12, 18; 19a, 21a)*;

After the petitioners had commenced their action in the U.S. District Court, and prior to the determination by the three-judge court in Lynch that Sec. 52-329 was unconstitutional, Dorr-Oliver, Inc., moved for a substitute garnishment under the provisions of Connecticut General Statutes Sec. 52-281 to replace the garnishment under Sec. 52-329 on its stated plea that said Sec. 52-329 was unconstitutional and, on the granting of the said application, simultaneously released its garnishment under Sec. 52-329 and issued and executed the garnishment under Sec. 52-281 (Complaint, par. 20, 21; 21a-22a);

The State Court hearing of the motion for the said substitute garnishment was not a hearing upon the merits of Dorr-Oliver's claim against petitioners, nor was there a 'probable cause' hearing held (Complaint, par. 22; 22a);

Petitioners have had their property seized, they have been denied the equal protection of the laws of the State of Connecticut, and the seizure was made prior to litigation without any opportunity for a court hearing of 'probable validity' as to the merits of the state court complaint in respect to either garnishment levied under Sec. 52-329 and under Sec. 52-281 (Complaint, par. 22, 23 and 24; 22a-23a);

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* This statute has been declared unconstitutional by a three-judge district court in Lynch v. Household Finance Corp. (D. C. Conn. 1973), F. S. (on remand from the Supreme Court, 405 U.S. 538, after dismissal by the U.S. District Court).

Petitioners have no adequate remedy in the state courts of Connecticut, have no adequate remedy at law and will suffer irreparable injury unless enforcement of the subject statutes is restrained (Complaint, par. 25; 23a).

The "Wherefore" clause (23a-24a) prayed that:

1. The U.S. District Court assume jurisdiction;

2. A three-judge court be convened, pursuant to provisions of Title 28 U.S.C., Sec. 2281 and 2284;

3. A declaratory judgment be entered, pursuant to 28 U.S.C. 2201 and 2202 and Rule 57, FRCP, declaring the cited Connecticut General Statutes to be unconstitutional on their face and as applied;

4. A permanent injunction be entered restraining the defendants, including the Deputy Sheriff, from enforcing the attachment of plaintiffs-petitioners' property created by the said writs of attachment, or from action under the color of authority of Sections 52-329, 52-280, 52-304, and 52-279 of the Connecticut General Statutes, including the said substitute garnishment;

5. A mandatory injunction be entered directing the defendants in the District Court action to release the said attachments and to permit the monies

attached* thereunder to be paid to petitioners herein;

6. A judgment be entered in favor of the petitioners in the sum of $25,000.00 as petitioners' damages;

7. Petitioners have such other, further and different relief as the court shall deem just and proper (Complaint, "Wherefore" Clause; 23a-24a).

Without answering, the motion to dismiss was filed on September 22, 1972 (Docket entries, 2a; 38a).

On September 20, 1972, petitioners filed a motion for preliminary injunction (Docket entries, 2a; 31a).

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* As set forth in second footnote on bottom of page 6 : Note that on November 30, 1969, the date the attachment (garnishment) was served on defendant City of Norwalk, the City had already denied in its answer to the U.S.D.C. for State of Connecticut, that it owed money to plaintiffs, thus additively negating any basis for the City to withhold any funds on the basis of the attachment, as stemming from the June 2, 1972 judgment.

On November 16, 1972, an order was entered denying petitioners' motion for preliminary injunction and the court stayed further proceedings until a decision was handed down by the three-judge district court in Lynch v. Household Finance Corp. (Civil Nos. 13,737 and 13,738, District of Connecticut). (3a; Opinion, 13a).

On February 6, 1973, petitioners cross-moved the U.S. District Court (Docket entries, 3a; 60a);

1. To vacate the stay of further proceedings;

2. To convene a three-judge court to hear the complaint;

3. Renewing petitioners' motion for a preliminary injunction;

4. To designate petitioners as members of the class of plaintiffs within the class in Lynch v. Household Finance Corp. (U.S. D.C. Conn. Civil Nos. 13,737, 13,738);

5. For summary judgment.

On May 11, 1973, the District Court filed its decision granting the motion to dismiss (Docket entries, 4a; Opinion, 6a).

On May 21, 1973, petitioners moved the District Court for re-argument of the dismissal motion (Docket entries, 4a; 90a), which motion was denied June 25, 1973.

Final judgment was entered on May 25, 1973 (Docket entries 4a; 5a).

Petitioners appealed to the Second Circuit Court of Appeals (No. 73-1884) from the District Court judgment of dismissal and from denial of petitioners' motions for temporary injunction and summary judgment.

The Second Circuit affirmed, without opinion (1A*), May 14, 1974.

REASONS FOR GRANTING THE WRIT

1. The Court below has so far deviated from this Court's declared doctrine as to call for the exercise of this Court's supervisory power over the federal judiciary.

2. The decision below is in conflict with this Court's prior decision in Ex Parte Fahey (1947), 332 U.S. 258, and Idlewild Liquor Corp. v. Epstein (1962), 370 U.S. 713.

ARGUMENT

POINT I

PETITIONERS' 42 U.S.C. 1983 COMPLAINT SEEKING INJUNCTION AGAINST ENFORCEMENT OF STATE STATUTES OF STATE-

* "A" references are to pages of the Appendix annexed hereto.

WIDE APPLICATION, WHERE NO DOUBTFUL QUESTION OF STATE LAW WAS INVOLVED, PRESENTED A SUBSTANTIAL FEDERAL CONSTITUTIONAL QUESTION AND MANDATED CONVENING A THREE-JUDGE DISTRICT COURT PANEL.

Ex Parte Fahey (1947), 332 U.S. 258.

Idlewild Liquor Corp. v. Epstein (1962), 370 U.S. 713.

In Epstein, supra, as herein, petitioners sued in a Federal District Court for a judgment declaring a statute, as applied, was repugnant to the Constitution and asked for an injunction against its enforcement.

A request for a three-judge court under 28 U.S.C. 2281, 2284, was denied (but the single District Court judge in Epstein retained jurisdiction of the cause in order to give the State Courts an opportunity to pass upon the constitutional issues presented, although there was no state litigation then pending).

This Court, in Epstein, granted certiorari and a motion for leave to file a petition for a writ of mandamus (at P. 715 of 370 U.S.), saying:

> "We agree with the Court of Appeals that a three-judge court should have been convened in this case. When an application for a statutory three-judge court is addressed to a District Court, the court's inquiry is appropriately limited to determine

> whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise, is within the requirements of the three-judge statute. Those criteria were assuredly met here, and the applicable jurisdictional statute therefore made it impermissible for a single judge to decide the merits of the case, either by granting or by withholding relief."

Additionally, although the District Court considered this Court's holding in Mitchum v. Foster (1972), 407 U.S. 225, the District Court refused to apply the principles therein set forth, holding "that very decision emphasized that a section 1983 suit does not qualify in any way 'the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding.' Id. at 243."

In so holding, the District Court disregarded that the main thrust of plaintiffs' amended complaint was to enjoin enforcement of a state statute of state-wide application and that the main thrust was not, as the Court indicated, to restrain a state court proceeding.

Having so misinterpreted plaintiffs' legal posture, the District Court refused to apply this Court's holding in Mitchum that section 1983 suits are excepted from the literal strictures of Section 2283.

The District Court also appears to rely, in dismissing, on the precept that "it is not entirely clear that some form of state court interlocutory review is not available to the plaintiffs. Finally, there is some reason to believe that the Connecticut General Assembly will accept the responsibility given it by Fuentes v. Shevin... and will legislate to eliminate the recurring questions in this field. In these circumstances, federal court intervention to review the sufficiency of a hearing in a pending state court litigation is unwarranted."; thus relying on unacceptable standards on which to predicate its dismissal of petitioners' complaint.

The mere statement of the proposition that remote prospective state court review* or equally remote possible state legislation is an adequate substitute for federal intervention to correct enforcement of unconstitutional state statutes demonstrates, clearly and unequivocally, the fallacy of the proposition, emphasized by the observation footnoted below re non-reviewability of interlocutory orders until after final judgment.

The District Court then went on to point out that Lynch v. Household Finance Corp. (D. C. Conn. 1973), F. S. , has settled the unconstitutionality of one statute under attack, Section 52-329, and then holds that petitioners' attack on Sec-

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* In Connecticut, review of interlocutory orders is not available, only final orders and judgments are reviewable. Conn. Gen Stat., Section 52-263.

tion 52-281 does not require a three-judge court, and, erroneously, the court contends that "since plaintiffs are not seeking to enjoin enforcement of the statute (Section 52-281), but simply challenging the sufficiency of a particular hearing held pursuant to that statute," thus ignoring the clear language of petitioners' complaint.

Compare Farley v. Farley (3rd Cir. 1973), F. 2d (opinion No. 71-1967, filed June 25, 1973), where the Third Circuit held that, on application for a three-judge district court, the single district court judge is limited to determining whether a substantial federal question and a basis for equitable relief are alleged, the court further holding that a claim is insubstantial only if its unsoundness so clearly results from previous court decisions as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.

See, also, Hannis Distilling Co. v. City of Baltimore (1910), 216 U.S. 285, 288.

While this Third Circuit ruling would characterize petitioners' attack on Sec. 52-329 (as unconstitutional) as insubstantial (since a three-judge court had already declared it unconstitutional but not this court) the characterization would not apply to petitioners' claim for equitable injunctive relief restraining "enforcement" of said Sec. 52-329, nor would it bar petitioners' claims of unconstitutionality re Sec. 52-281 and the other sections, as they have not yet been the subject of U.S. Supreme Court decisions.

Hannis, supra.

It is respectfully submitted that the District Court erred in concluding that abstention was not warranted in respect to plaintiffs' claims and should not be exercised and plaintiffs' equitable claims should be dismissed.

In what is deemed to be further error, the District Court also deemed plaintiffs' claims for money damages to warrant dismissal, and apparently only for the reason that the civil rights claims for injunctive relief were dismissed.

POINT II

THE SINGLE DISTRICT COURT JUDGE EXCEEDED HIS AUTHORIZED JURISDICTION IN DENYING PETITIONERS' MOTION FOR INTERLOCUTORY INJUNCTION ENJOINING ENFORCEMENT OF STATE STATUTE OF STATE-WIDE APPLICATION.

The rationale that applies, clearly, to actions to enjoin enforcement of state statutes deemed repugnant to the federal constitution applies with equal vigor to applications within the action for temporary injunction seeking the same relief as does the complaint.

Stratton v. St. Louis S. W. Ry. (1930), 282 U.S. 10, 15, 18.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the U. S. Court of Appeals for the Second Circuit.

Respectfully submitted,

EDMOND PFOTZER

and

E. JOHN PFOTZER

Petitioners pro se

Edmond Pfotzer

E. John Pfotzer

JUDGMENT APPEALED FROM

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of May one thousand nine hundred and seventy-four.

Present:

HON. IRVING R. KAUFMAN,
Chief Judge:

HON. PAUL R. HAYS

HON. JAMES L. OAKES

Circuit Judges.

EDMOND PFOTZER and E. JOHN PFOTZER, Individually and as co-partners doing business as E. & E. J. PFOTZER,
Plaintiffs-Appellants,

v.

DORR-OLIVER, INC., DONALD J. ST. JOHN, MICHAEL WARHOLIC, and THE CITY OF NORWALK,
Defendants-Appellees.

73-1884

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

s: IRVING R. KAUFMAN

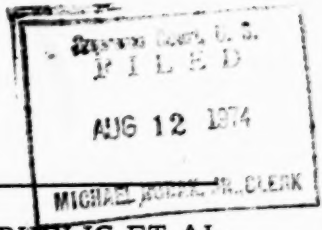
PAUL R. HAYS

JAMES L. OAKES

SUPREME COURT OF THE UNITED STATES

Oct. Term, 1974

No. 74-110



PFOTZER ET AL ETC. V. WARHOLIC ET AL

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EDMOND PFOTZER
and
E. JOHN PFOTZER
Petitioners pro se

P. O. Box 987
Wilmington, Delaware 19899

Tel. (302) 571-0595

JUDGMENT APPEALED FROM

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of May, one thousand nine hundred and seventy-four.

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EDMOND PFOTZER and E. JOHN PFOTZER,
Individually and as co-partners doing
business as E. & E.J. PFOTZER,
Plaintiffs-Appelants,

v.

DORR-OLIVER, INC., DONALD J. ST. JOHN,
MICHAEL WARHOLIC, and
THE CITY OF NORWALK,
Defendants-Appellees.

73-1884

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

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s: IRVING R. KAUFMAN

PAUL R. HAYS

JAMES L. OAKES

FILED
May 11 9:37 AM '73

CLERK
U. S. District Court
Bridgeport, Conn.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT
BRIDGEPORT

EDMOND PFOTZER and E. JOHN PFOTZER Individually and as Co-Partners d/b/a E. & E. J. PFOTZER	)	
vs	)	Civil B-587
DORR-OLIVER, INC. HOWARD DEAN DONALD J. ST. JOHN MICHAEL WARHOLIC and THE CITY OF NORWALK	)	

JUDGMENT

This case having come on for hearing on Defendants' Motion to Dismiss and the Court having rendered its Ruling on Motion to Dismiss under date of May 11, 1973, granting Defendants' Motion,

It is ORDERED, ADJUDGED AND DECREED that this action be and is hereby dismissed, with costs to the Defendants.

Dated at Bridgeport, Connecticut this 25th day of May, 1973.

SYLVESTER A. MARKOWSKI, Clerk

By: (Sgd) VINCENT R. DE ROSA
Deputy-in-Charge

OPINION - GRANTING DISMISSAL MOTION

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

EDMOND PFOTZER, ET AL :

V. : Civil No. B-587

DORR-OLIVER, INC., ET AL :

MEMORANDUM OF DECISION
ON DEFENDANTS' MOTION TO DISMISS

Defendants have moved to dismiss this suit, brought pursuant to 42 U.S.C. Sec. 1983, challenging the garnishment by the defendant, Dorr-Oliver, Inc., of plaintiffs' debtor in connection with state court litigation brought by Dorr-Oliver against plaintiffs. Though much of the controversy in this area has been resolved by the decision of the three-judge district court in Lynch v. Household Finance Corp., ___F. Supp. ___(D. Conn. Jan. 12, 1973), which declared unconstitutional Connecticut's pre-judgment garnishment statute, Conn. Gen. Stat. Sec. 52-329, this case nevertheless presents its own special complications.

On November 30, 1971, counsel for Dorr-Oliver issued a writ of attachment against property of the plaintiffs in initiating an action in the Superior Court for Fairfield County against the Pfotzers for alleged non-payment of funds owed in connection with a sale of

equipment. The writ was served upon the defendant, City of Norwalk, to garnish funds of the City which were owed to the Pfotzers. This pre-judgment garnishment was vulnerable to constitutional attack for the reasons ultimately set forth in Lynch. Alerted to the vulnerability of its garnishment by Snaidach v. Family Finance Corp., 395 U.S. 337 (1969), Fuentes v. Shevin, 407 U.S. 67 (1972), Dorr-Oliver moved in the Superior Court for a substitute garnishment pursuant to Conn. Gen. Stat. Sec. 52-281. That statute permits any plaintiff to move for an order of attachment or further attachment during the "pendency" of a state court action that was or might have been commenced by attachment. The motion sought a court order authorizing a garnishment upon the Pfotzers' property in the possession of the City of Norwalk in an amount equal to the amount then subject to the prior garnishment. The motion requested that the court order for the substitute garnishment be contingent upon release of the prior garnishment. The Pfotzers filed in the Superior Court an "objection" to Dorr-Oliver's motion.

On October 26, 1972, Dorr-Oliver's motion was heard in the Superior Court by Judge Tierney. E. John Pfotzer, who has been appearing pro se in this Court and in the state court, attended the hearing and presented oral argument. Judge Tierney

granted the motion for substitute garnishment. Dorr-Oliver then released the original garnishment, and counsel for Dorr-Oliver issued a new writ directing the sheriff to "garnish the City of Norwalk to the value of $22,175 the goods or estate of Edmond Pfotzer and E. John Pfotzer." The release and new garnishment were served by the sheriff.

Plaintiffs in this Court attack the second garnishment on the ground that the hearing before Judge Tierney did not comply with Lynch because they were denied the opportunity to litigate any aspect of the merits of Dorr-Oliver's claim against them and that, as a result, the state court gave no consideration to the necessity for the second garnishment. The Pfotzers also claim the second garnishment is constitutionally defective because it is a "continuation" of the first garnishment, which they allege is defective under Lynch. Plaintiffs ask to be designated as members of the Lynch class to secure relief.

Defendants move to dismiss on the ground that the first garnishment, having been released, is no longer subject to attack, and that the second garnishment, having been obtained after a state court hearing, is not vulnerable to attack under Lynch. On November 16, 1972, all proceedings in this case were stayed pending decision by the three-judge court in Lynch. Plaintiffs' motion to vacate that stay is granted.

The contentions of the defendants do not necessarily entitle them to dismissal. If the merits of this dispute were to be considered by this Court, plaintiffs would be entitled to prove their contention that the second garnishment was obtained without the underlying claim being tested in a "fair prior hearing." Fuentes v. Shevin, supra, 407 U.S. at 96. The fact that the Pfotzers had notice of the hearing and were permitted to appear does not refute their due process argument, if in fact, as they seem to allege, they were denied all opportunity to litigate whether the Dorr-Oliver claim had any merit. Moreover, the release of the first garnishment does not necessarily end the controversy, if, as the plaintiffs allege, the first garnishment served, in effect, as the basis for the second garnishment.

Though plaintiffs' claims thus have the sufficiency to withstand a motion to dismiss, they nonetheless encounter a special obstacle that requires dismissal. Plaintiffs' Federal suit seeks a determination of the constitutionality of a decision reached in a pending state suit. Even if the state court hearing that preceded the granting of Dorr-Oliver's motion for a second garnishment was constitutionally deficient, correction of that alleged error would require injunctive or declaratory relief with respect to a pending state court proceeding. In Lynch the Supreme Court was careful to note that the garnishment there attacked was accomplished by persons "not proceeding under a court's supervision" using sheriffs who were

"not acting pursuant to a court order," and that the garnishment occurred before the state court defendant had been served with process. For these reasons the Court concluded that the injunction suit attacking the garnishment was not barred by the anti-injunction statute, 28 U.S.C. § 2283. Lynch v. Household Finance Corp., supra, 405 U.S. at 554-55. Despite the fears of the dissenters, id. at 559, the Court did not reject Hill v. Martin, 296 U.S. 393 (1935), but emphasized language from Hill stating that a federal court is forbidden to enjoin "all steps taken in the state court . . . from the institution to the close of the final process." Lynch at 555 (emphasis original). It seems clear that the Court would have viewed a federal suit attacking the second garnishment here as barred by § 2283.

It is true that the Court has subsequently decided that suits under § 1983 are excepted from the literal strictures of § 2283, Mitchum v. Foster, 407 U.S. 225 (1972), but that every decision emphasized that a § 1983 suit does not qualify in any way "the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding." Id. at 243. The Court has not yet decided how rigorously these principles are to apply when federal injunctive relief is sought against state civil proceedings, although three members of the Court have stated that the relevant considerations, outlined in a suit attacking state criminal proceedings, Young-

er v. Harris, 401 U.S. 37 (1971), are "equally applicable where state civil litigation is in progress." Lynch v. Household Finance Corp., supra, 405 U.S. at 561 (dissenting opinion).

Even if the Younger principles apply to state civil litigation with somewhat reduced force, they are sufficent to bar federal court intervention in the state proceeding at issue in this case. No sensitive First Amendment issues are involved, cf. Dombrowski v. Pfister, 380 U.S. 479 (1965), and the merits of Dorr-Oliver's underlying claim will not only be tested but resolved in the pending state court action. Moreover, it is not entirely clear that some form of state court interlocutory review is not available to the plaintiffs. Finally, there is some reason to believe that the Connecticut General Assembly will accept the responsibility given it by Fuentes v. Shevin, supra, and will legislate to eliminate the recurring questions in this field. In these circumstances, federal court intervention to review the sufficency of a hearing in a pending state court litigation is unwarranted.

Plaintiffs have sought a three-judge Court under 28 U.S.C. § 2281, and were one required, a one judge court could not dismiss on Younger grounds, Abele v. Markle, 452 F.2d 1121 (2d Cir. 1971). However, Lynch has settled the unconstitutionality of § 52-329, and, but for the Younger problem, a one-judge court could determine whether plaintiffs were properly

within the Lynch class and if so, accord appropriate relief. Plaintiffs attack on § 52-281, under which Dorr-Oliver obtained the second garnishment, does not require a three-judge court, since plaintiffs are not seeking to enjoin enforcement of the statute, but simply challenging the sufficiency of a particular hearing held pursuant to that statute. Cf. Wallace v. Johnson, Civ. No. 14,499 (D. Conn. Nov. 26, 1971). Since plaintiffs' claims do not require a three-judge court to consider their merits, Abele does not preclude a one-judge court from considering abstention.

Younger considerations do not warrant the type of abstention that would postpone federal court consideration of the federal claim, but rather dismissal, since the federal claim is to be raised and adjudicated in the state court, subject only to Supreme Court review. See Hart and Wechsler, The Federal Courts and the Federal System 1043 (2d ed. 1973). Since the equitable jurisdiction of this Court should not be exercised, the equitable claims should be dismissed. See Samuels v. Mackell, 401 U.S. 66, 73 (1971) (approving dismissal as a remedy where Younger considerations are applicable).

In addition to their claim for injunctive relief, plaintiffs seek damages, but this claim also warrants dismissal. Even if plaintiffs prevailed on the merits of their attack on both garnishments, damages would not be awarded. The defendants obtained the first garnishment under a statute valid at the time they acted, and any infirmity in the second garnishment

stems from the alleged inadequacy of the hearing in the state court. Even if the hearing was deficient, defendants would in no event have to respond in damages for acting in good faith upon a court order they believed they had validly obtained.

Accordingly, the defendants' motion to dismiss is granted.

Dated at New Haven, Connecticut, this 10 day of May, 1973.

JON O. NEWMAN
Jon O. Newman
United States District Judge

FILED
Nov. 16 10:00 AM '72

CLERK
U. S. District Court
Bridgeport, Conn.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT
BRIDGEPORT

ALLIED CORK, INC.)

V.) CIVIL ACTION NO. B-592

ROESSLER PACKING COMPANY, INCORPORATED, CARL ROESSLER, INCORPORATED, and ROESSLER PACKING COMPANY OF BRIDGEPORT, INC.)

JOSEPH KAVANEWSKY and GREEN VALLEY LAKES, INC., individually and on behalf of all other persons similarly situated)

V.) CIVIL ACTION NO. B-593

GREATER DEVELOPMENT COMPANY OF CONNECTICUT, INC.; RAY CLARK d/b/a/ PORT CONSTRUCTION COMPANY; DAVID E. KAMINS, individually and as representative of the Commissioners of the Superior Court of the State of Connecticut)

EDMOND PFOTZER AND E. JOHN PFOTZER, INDIVIDUALLY AND AS CO-PARTNERS DOING BUSINESS AS E. & E. J. PFOTZER)

V.) CIVIL ACTION NO. B-587

DORR-OLIVER, INC.; HOWARD DEAN; DONALD J. ST. JOHN; MICHAEL WARHOLIC; AND THE CITY OF NORWALK)

OPINION - DENYING TEMPORARY INJUNCTIVE RELIEF

In these three unrelated cases challenging the constitutionality of Connecticut's prejudgment attachment and garnishment statutes, Conn. Gen. Stats. § 52-279 et seq., § 52-329 et seq., motions have been filed to remove the various attachments and garnishments currently in effect. Plaintiffs in No. B-593 and No. B-587 and defendants in No. B-592 allege that the statutes are unconstitutional in failing to provide for prior notice and hearing. They rely on Sniadach v. Family Finance Corporation, 395 U.S. 337 (1969), and Fuentes v. Shevin, 407 U.S. 67 (1972). The garnishment in No. B-592 arose in connection with a suit originally filed in this Court, whereas No. B-593 and No. B-587 challenge garnishment and attachments in connection with pending state court actions.

None of the movants has shown sufficient threat of irreparable injury to warrant temporary injunctive relief.

Moreover, the issue on the merits in each of these cases appears to be substantially similar to the issue which is now sub judice before a three-judge court in this District in Lynch v. Household Finance Corporation, Civ. Nos. 13737, 13738, upon remand from the Supreme Court, 405 U.S. 538 (1972). Since plaintiffs in Lynch sought class action designation, it seems appropriate to stay these proceedings until Lynch has been decided. At that point it can be deter-

OPINION - DENYING TEMPORARY INJUNCTIVE RELIEF

mined whether these parties are appropriately within whatever classes of plaintiffs and defendants are designated in the Lynch litigation.

Accordingly, in No. B-593 and No. B-587 the motions for temporary injunctive relief are denied, and all further proceedings are stayed pending decision by the three-judge court in Lynch v. Household Finance Corporation, supra. In No. B-592 the motion to discharge the garnishment is denied.

Dated at Hartford, Connecticut, this 15 day of November, 1972.

JON O. NEWMAN
Jon O. Newman
United States District Judge

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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-110

EDMOND PFOTZER and E. JOHN PFOTZER, Individually and as co-partners doing business under the firm name and style of E. & E. J. Pfotzer,

Petitioners,

vs.

DORR-OLIVER, INC., DONALD J. ST. JOHN, MICHAEL WARHOLIC, and THE CITY OF NORWALK,

Respondents.

BRIEF IN OPPOSITION FOR A PETITION OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ARTHUR J. GOLDBLATT
Corporation Counsel
City Hall, P. O. Box 798
South Norwalk, Connecticut 06856

Attorney for City of Norwalk

TABLE OF CONTENTS

PAGE

Preliminary Statement 1

Statement of Issue 1

Statement of Case 2

ARGUMENT:

POINT I—

The question before the District Court was whether a three-judge court was required 4

POINT II—

Appellants' federal suit sought a determination of constitutionality of a decision reached in a pending state suit 8

POINT III—

No irreparable harm 14

POINT IV—

One judge can decide 15

POINT V—

The 52-329 garnishment was not void *ab initio* 18

POINT VI—

No damages should be awarded 20

CONCLUSION 21

CASES CITED PAGE

Abele v. *Markle*, 425 F.2d 1121 (1971) 15, 17

Baker v. *Carr*, 206 F.Supp. 341 18

Dombrowski v. *Pfister*, 380 U.S. 479 (1965) 15

Golden v. *Zwickler*, 394 U.S. 103 18

Hill v. *Martin*, 296 U.S. 393 (1935) 11

Idlewild Liquor Corp. v. *Epstein*, 370 U.S. 713 (1962) 4, 14, 16

Lynch v. *Household Finance Corp.*, 405 U.S. 538 (1972), on remand (D.C. Conn. 1973), —— F.S —— 3, 5, 7, 11, 14, 19

Mitchum v. *Foster*, 407 U.S. 225 (1972) 12

Samuels v. *Mackell*, 401 U.S. 66 (1971) 17

Santiago v. *Corporacion de Renovacion Urban Y Vivienda Puerto Rico*, 453 F.2d 794 (1972) 8

Younger v. *Harris*, 401 U.S. 37 (1971) 12

STATUTES

Title 28 U.S.C. § 2201 2

Title 28 U.S.C. § 2202 2

Title 28 U.S.C. § 2281 ..... 2, 4, 10

Title 28 U.S.C. § 2283 ..... 4, 11, 12, 14

Title 28 U.S.C. § 2284 2

Title 42 U.S.C. § 1983 2

PAGE

Connecticut General Statutes

§ 52-279 ..... 2, 10, 16

§ 52-280 ..... 2, 10, 16

§ 52-281 ..... 2, 5, 6, 7, 11, 12, 15, 16, 18

§ 52-304 ..... 2, 10, 16

§ 52-329 ..... 2, 5, 6, 7, 10, 11, 15, 16, 18, 19

In the

Supreme Court of the United States

October Term, 1974

No. 74-110

Edmond Pfotzer and E. John Pfotzer, Individually and as co-partners doing business under the firm name and style of E. & E. J. Pfotzer,

Petitioners,

vs.

Dorr-Oliver, Inc., Donald J. St. John, Michael Warholic, and The City of Norwalk,

Respondents.

BRIEF OF RESPONDENT, CITY OF NORWALK

Preliminary Statement

This is an appeal from a final judgment of dismissal by the District Court of a complaint requesting declaratory judgment and injunction by means of a three-judge court.

Statement of Issue

Did United States District Court Judge Jon O. Newman either lack jurisdiction or exceed his authority in dismissing Appellants' complaint requesting a three-judge court.

Statement of Case

1. Dorr-Oliver Incorporated (Appellee) instituted a lawsuit against E. and E. J. Pfotzer (Appellants) in the Superior Court of the State of Connecticut at Stamford, for collection of a balance due and owing on a sales contract, by prejudgment garnishment (November 30, 1971) in accordance with Connecticut General Statute 52-329.

2. On September 1, 1972, E. and E. John Pfotzer instituted suit in the United States District Court for the District of Connecticut, pursuant to Title 42 U.S.C. 1983 for declaratory judgment and injunctive relief under Title 28 U.S.C. §§ 2201 and 2202 to declare Sections 52-279, 52-280, 52-281 and 52-304 of the Connecticut General Statutes unconstitutional and to restrain their enforcement. A three-judge District Court pursuant to Title 28 U.S.C. §§ 2281 and 2284 was requested (Appellants' Appendix 25a ff.).

3. On October 4, 1972, Dorr-Oliver Incorporated moved, under Connecticut General Statute 52-281, to substitute the prejudgment garnishment, and after notice and hearing, October 26, 1972, before Judge Tierny of the Superior Court (at which E. John Pfotzer and Counsel for the garnishee City of Norwalk attended and argued), the motion was granted, the original garnishment release and another garnishment entered (Appellants' Appendix 24 a. ff.).

4. On October 31, 1972, E. and E. J. Pfotzer amended their U.S.D.C. complaint alleging that the hearing on said motion to substitute garnishment did not constitute a hearing upon the merits of the State Court complaint (Appellants' Appendix 16 a ff.).

5. On November 8, 1972 Dorr-Oliver Incorporated moved to dismiss the U.S.D.C. complaint for the reason that the basis of the complaint no longer existed because of the release of the prejudgment garnishment and entering of another garnishment, subsequent thereto (Appellants' Appendix 41 a). E. and E. John Pfotzer filed an affidavit in opposition to the Motion to Dismiss stating that there was no "hearing" and that the second garnishment was a continuation of the first garnishment (Appellants' Appendix 49 a ff.).

6. On November 15, 1972, District Court Judge Jon O. Newman denied E. and J. Pfotzer's motion for preliminary injunction and ordered this matter and others stayed, pending decision of the court in *Lynch* v. *Household Finance Corporation* (Appellants' Appendix 13 a).

7. On January 23, 1973, Dorr Oliver Inc. reclaimed their Motion to Dismiss (Appellants' Appendix 41 a).

8. On May 11, 1973, United States District Judge Jon O. Newman granted Dorr-Oliver Incorporated Motion to dismiss and entered Judgment May 25, 1973 (Appellants' Appendix 5 a. ff.).

9. After appeal was docketed in the United States Circuit Court of Appeals, E. and E. J. Pfotzer asked the United States District Court for permission to reargue the Motion to Dismiss which was denied June 25, 1973.

10. E. and E. John Pfotzer applied to the United States Supreme Court for leave to file petition for writ of mandamus and/or prohibition, which was denied.

ARGUMENT

I.

The question before the District Court was whether a three-judge court was required.

We are concerned here with Title 28 U.S.C. § 2281—Injunction against enforcement of State statute; three-judge court required, and, Title 28 U.S.C. § 2283—Stay of State court proceedings.

It is not disputed that an injunction restraining the enforcement, operation or execution of a State statute shall not be granted by any district court or judge upon the ground of the unconstitutionality of such statute, but rather must be heard by a district court of three judges.

Although an application may be filed for and a three-judge court claimed, an initial determination must be made by the district court judge as to whether or not the claim for a three-judge court is in fact proper. The U.S. Supreme Court, in *Idlewild Liquor Corp.* v. *Epstein* (1962), 370 U.S. 713, has stated:

> "When an application for a statutory three-judge court is addressed to a district court, the court's inquiry is appropriately limited to determining whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute." (page 715)

Initially, appellants' complaint in the district court requested a declaratory judgment and injunctive relief rela-

tive to Connecticut General Statute § 52-329, which was the authority under which the appellee—Dorr-Oliver Incorporated—obtained garnishment of funds belonging to the non-resident appellants. Section 52-329 was the sole and only Connecticut statute which the appellee used in order to obtain the first garnishment.

At that point in time, the question as to the constitutionality of Section 52-329 had not been reviewed or decided by the Federal Courts. The appellants then correctly presented the question to the district court for review and consideration of the constitutional question. The appellees concede that at that point in time a substantial federal question existed and that a basis for a three-judge court probably existed. If the district court judge at that point had dismissed the complaint, the appellants' present argument would be valid and controlling. The district court judge, however, did not dismiss, but did order a stay of proceeding pending determination by a three-judge court which was considering the constitutionality of Connecticut's prejudgment attachment and garnishment statute, Connecticut General Statutes § 52-329 in *Lynch* v. *Household Finance Corporation* (Appellants' Appendix 13a. ff.).

Prior to the district court ordering a stay of proceedings, Dorr-Oliver Incorporated (Appellee) moved—in the State Supreme Court under Connecticut General Statute 52-281 and on the basis that "Recent decisions rendered in the United States District Court . . . have raised questions as to whether prejudgment garnishment statutes, similar to the Connecticut General Statutes, violate the due process clause of the Fourteenth Amendment of the Constitution of the United States by failing to provide notice and an opportunity for hearing prior to the making of garnishment" for a substitute garnishment "in an

amount equal to the amount presently garnished, $22,715.00, subject to and contingent upon the plaintiff release of the present garnishment as it relates to the City of Norwalk and Transamerica Insurance Company" (Appellants' Appendix 84a ff.)

The State Superior court granted Dorr-Oliver's (Appellees') motion for a second garnishment contingent upon release of the first garnishment in accordance with Connecticut General Statute 52-281. The first garnishment, which was obtained under Connecticut General Statute 52-329, was released November 2, 1972 (Appellants' Appendix 88a), and the second garnishment under Connecticut General Statute 52-281 served immediately upon release of the first garnishment.

E. and E. John Pfotzer, again prior to the stay of proceedings, filed an amended complaint (Appellants' Appendix 16a ff.) alleging the second garnishment and claiming that the attendance at court before Judge Tierny and oral and written argument in opposition to its granting and response to Judge Tierny's questions by counsel for Dorr-Oliver, counsel for the City of Norwalk (garnishee), and E. John Pfotzer did not constitute a "hearing" upon the merits of the claims of the parties, and that the procedure violated their constitutional rights. It is further claimed by the appellee that the second garnishment was a continuation of the first garnishment and therefore void.

"15. The 'substitute garnishment' merely replaced the original garnishment"

"25. Defendant still continues the deprivation of plaintiffs' funds commenced by the illegal garnishment under void Sec. 52-329" (Appellants' Appendix 62a ff.)

After the release of the first garnishment (§ 52-329) and the filing of the second garnishment (§ 52-281), Dorr-Oliver Incorporated moved to dismiss the complaint in the district court on the basis that the garnishment attacked therein, the first garnishment, no longer existed and therefore was no longer subject to review and consideration. It was at this point that the stay of proceeding was ordered.

Up to the point where the first garnishment was released, the appellees concede that there was probably a substantial federal question involved which would have required a determination by a three-judge court. At the point in time when the stay in proceedings was ordered, the questions before the court were whether the first garnishment under § 52-329 was violative of the constitutional rights of E. and E. J. Pfotzer (appellants) and whether the release of the first garnishment and imposition of the second or substitute garnishment was with a hearing or was without a hearing.

The three-judge court in *Lynch* v. *Household Finance Corporation* (1972) 405 U.S. 538, on remand (D. C. Conn. 1973) —— F.S. ——, decided that Connecticut General Statute 52-329 was unconstitutional.

Upon the rendering of the decision by the three-judge court in *Lynch* v. *Household Finance Corporation*, the question presented to the district court by E. and E. J. Pfotzer as to the constitutionality of said statute became moot, having already been decided, and the constitutional question thereby presented was no longer of substance. Clearly, an attachment or garnishment under section 52-329 of the Connecticut General Statutes was unconstitutional.

If it were not for the fact that the first garnishment (52-329) was released and the second garnishment ordered

(52-281) prior to the decision of the *Lynch* case, E. and E. J. Pfotzer would be correct in their argument and the first garnishment would have to be released as unconstitutional. With the second garnishment, the court was required to decide whether E. and E. J. Pfotzer's claim required a three-judge court and thereby whether the constitutional question raised was substantial; whether the complaint alleged a basis for equitable relief and whether the case otherwise presented the requirements of a three-judge court.

The basis upon which the district court was required to make its determination was upon the pleadings presented.

Santiago v. *Corporacion de Renovacion Urbana Y Vivienda Puerto Rico, C.A. Puerto Rico* (1972), 543 F.2d 794.

II.

Appellants' federal suit sought a determination of constitutionality of a decision reached in a pending state suit.

At the time the district court considered and granted dismissal of the district court suit, Judge Newman had before him as part of the pleadings of E. and E. J. Pfotzer the initial complaint (Appellants' Appendix 25a), the amended complaint, together with exhibits thereto (Appellants' Appendix 16a), Affidavit in support of a motion for preliminary injunction (Appellants' Appendix 33a); Affidavit in opposition to dismissal motion (Appellants' Appendix 49a) with exhibit, objection to motion for substitute garnishment (Appellants' Appendix 55a); statement in support of summary judgment motion (Appellants' Appendix 62a) and Affidavit in support of cross-motion to vacate stay, convene statutory three-judge court to act herein,

renew motion for temporary injunctive relief, to designate plaintiff as numbers of class *infra*, for summary judgment, and in opposition to defendant's motion to dismiss (Appellants' Appendix 67a) together with *information obtained* during oral arguments.

In the "First Amended Complaint" it is alleged:

"21. On October 26, 1972, and following the hearing of a motion by plaintiff for a preliminary injunction in this action upon October 16, 1972, the motion of defendant herein for a 'Substitute Garnishment' came on to be heard before the Superior Court of the State of Connecticut, Fairfield County, Tierny, *J.*, and upon hearing the parties, the said motion ("Exhibit B") was granted.

"22. The hearing of the said motion for a 'Substitute Garnishment' did not constitute a hearing upon the merits of the alleged claim against these plaintiffs of the defendant Dorr-Oliver Inc., or upon the alleged defenses and counter-claim etc. to said alleged claim and no evidence was presented to the Superior Court as to the claimed necessity of such 'Substitute Garnishment'.

"23. These plaintiffs have been denied the equal protection of the laws of the State of Connecticut in that their property has been seized, upon a writ of attachment issued by a private party, defendant Howard Dean, Esq., and upon a 'Substitute Garnishment' with no opportunity for a Court hearing upon the merits of the allegations of the proposed complaint, with no opportunity for a hearing, such as was required upon plaintiffs' application to the Court for an order of attachment, in aid of counter-claim as relating to Dorr-Oliver's ability

> to pay any prospective judgment in favor of these plaintiffs, and with no procedure available to them in the Courts of the State of Connecticut to question or attack the said writ of attachment." (Appellants' Appendix 22a, 23a)
>
> (It should be noted that although Howard Dean, Esq. is referred to as a defendant he was in fact never served with process.)

In the prayer for relief the First Amended Complaint, among other requests, requested an injunction restraining the defendants (Appellees herein) from enforcing the attachment served "under the color of the authority of Sections 52-279, 52-280, 52-304 and 52-329 of the Connecticut General Statutes, and from enforcing a 'Substitute Writ of Garnishment' issued by the Clerk of the Superior Court of the State of Connecticut, Fairfield County (paragraph 21, supra) . . ." (Appellants' Appendix 24a).

The Court's attention is directed further to paragraph 4 of the Affidavit in opposition to the motion to dismiss (Appellants' Appendix 51a); paragraph I, page 2 of objection to motion for substitute garnishment (Appellants' Appendix 56a); paragraphs 15 and 24, statement in support of summary judgment motion (Appellants' Appendix 64a, 65a); and paragraphs 9 and 10, Affidavit in support of cross-motions, etc. (Appellants' Appendix 69a) as further indications, in the pleadings that the federal suit sought a determination of the constitutionality of a decision reached in a pending state suit, namely that the state court hearing that preceded the granting of Dorr-Oliver's motion for a second garnishment was constitutionally deficient.

It should be noted that the prayer for relief in the First Amended Complaint, and the only amended complaint in

the district court action, does not include a specific reference to Connecticut General Statute 52-281.

The district court was therefore presented an issue, on the basis of the pleadings presented, to which the court could not affirmatively respond because of the restriction that a court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgment (Title 28, U.S.C. §2283, c646, 62 Stat. 968).

The prohibition of § 2283 is against a stay of "proceedings in a State Court". That term is comprehensive. "It includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process."

Hill v. *Martin*, 296 U.S. 393 (1935).

As stated previously if it were not for the fact that the first garnishment was released and the second garnishment filed prior to the rendering of the decision in the *Lynch* case the Appellants' argument relative to section 52-329 would prevail and the district court, under the logic of the *Lynch* decision, would have had the authority and the jurisdiction to enjoin all actions with respect to 52-329. Referring to section 52-329 the *Lynch* court stated:

> "But the garnishment was, in this case, an action taken by private parties who were not proceeding under a court's supervision and who were using, as agents, state officials who were themselves not acting pursuant to a court order or under a court's authority."
>
> *Lynch* v. *Household Finance Corporation*, 450 U.S. 538, 554, 555 (1972).

The pleadings presented to the district court included the motion to dismiss (Appellants' Appendix 41a-48a) and the pleadings submitted in the State court proceeding relative to the release of the first garnishment and granting of the second or subsequent garnishment. The granting of the second garnishment under authority of Connecticut General Statute 52-281 was not an action taken by a private party without court supervision and the actions of counsel for Dorr-Oliver Incorporated and the service of the second garnishment by the sheriff were not actions taken without the court's authority. If the district court were to have acted as E. and E. J. Pfotzer has asked the court to act, to determine that the proceedings in the State court for release of the first garnishment and granting of the second garnishment did not comply with the Lynch decision, then the district court would have been violating the prohibition of section 2283.

The Supreme Court in *Mitchum* v. *Foster*, 407 U.S. 225, 92 S.Ct. 2151 (1972), concluded that section 1983 is an Act of Congress that falls within the "expressly authorized" exception of that law. The Court stated at page 2162:

> "In so concluding, we do not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding."

The decision in *Mitchum* was only that the District Court in that case was in error in holding that, because of the anti-injunction statute, it was absolutely without power under section 1983 to enjoin a pending proceeding in a state court under any circumstances whatsoever.

Previously in *Younger* v. *Harris*, 401 U.S. 37 (1971), the Supreme Court stated:

> "The precise reason for this longstanding public policy against federal court interference with state court proceedings have never been specifically identified but the primary sources of the policy are plain. One is the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied relief." (page 43)

and,

> "This brief discussion should be enough to suggest some of the reasons why it has been perfectly natural for our cases to repeat time and time again that the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions." (page 45)

and,

> "In all of these cases the Court stresses the importance of showing irreparable injury, the traditional prerequisite to obtaining an injunction. In addition, however, the Court also made clear that in view of the fundamental policy against federal interference with state criminal prosecutions, even irreparable injury is insufficient unless it is 'both great and immediate'." (page 46)

The *Lynch* decision recognized the *Younger* and companion case decisions and stated:

> "Of course, those case involved federal injunctions against state criminal proceedings, but the relevant considerations, in my view, are equally applicable

where state civil litigation is in progress, as is here the case."

(*Lynch* v. *Household Finance Corporation*, 405 U.S. 538, 561).

Therefore, upon the facts presented the exception to the prohibition of 2283 does not appear applicable and federal court intervention to review the sufficiency of a hearing in a pending state court litigation is unwarranted.

III.

No irreparable harm.

On the issue of irreparable injury, E. and E. J. Pfotzer alleged in First Amended Complaint that they have been deprived of the use of the money under attachment ($22,175.00) "and have been unable to use it in the procurement of business which is the sole source of their income and livelihood, and relatedly have been unable to use it in their construction contracts because their ability to furnish bid bonds and performance and payment bonds has been greatly impaired". (First Amended Complaint, paragraph 15, Appellants' Appendix 20 a).

E. and E. J. Pfotzer further alleged that the monies attached were a portion of monies owing to E. and E. J. Pfotzer from a contract and from a judgment recovered against the City of Norwalk. (Paragraph 14, First Amended Complaint, Appellants' Appendix 19 a, 20 a). E. and E. J. Pfotzer had obtained a judgment against the City of Norwalk and others for the sum of $246,788.10. (Affidavit in Support of Motion for an Order Granting a Preliminary Injunction, paragraphs 2, 3, Appellants' Appendix 76 a). E. and E. J. Pfotzer further stated to the district court by Affidavit in Support of Motion for an

Order Granting a Preliminary Injunction, at paragraph 12, that the withholding of $22,175.00 "greatly hindered them" (Appellants' Appendix 78 a).

A hindrance does not constitute irreparable harm.

On the basis of the pleadings presented to the district court, there was no showing of irreparable harm—either in compensable damages or violation of constitutional rights.

> "It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings."
>
> *Dombrowski* v. *Pfister*, 380 U.S. 479, 484, 485 (1965).

IV.

One Judge can decide.

In accordance with the *Epstein* decision (supra), and *Abele* v. *Markle*, 425 F.2d 1121 (1971), an initial determination must be made by the district court judge as to whether or not a claim for a three-judge court is in fact proper.

At the time of dismissal, the Lynch decision had been rendered and section 52-329 of the Connecticut General Statutes was determined to be unconstitutional. This portion of E. and E. J. Pfotzer's claims before the district court had therefore been decided. The amended complaint of E. and E. J. Pfotzer alleged the state court proceeding under section 52-281 and attempted by alleging a continuation of the first garnishment by means of the state court proceedings into the second garnishment.

"4. Plaintiffs seek an injunction and declaratory judgment (Title 28 U.S.C. §§ 2201 and 2202) restraining the enforcement of a garnishment of their property and declaring that Sections 52-279, 52-280, 52-281 and 52-304 of the Connecticut General Statutes are unconstitutional on their face, and *as applied and used* by the defendants, upon the grounds that the said statutes and *their specific application by the defendants* against the plaintiff herein have deprived plaintiff of the equal protection of the laws and due process of law as guaranteed to them by the Fourteenth Amendment to the United States Constitution." (Emphasis added) (First Amended Complaint, paragraph 4, Appellants' Appendix 17 a).

It should be noted that the amended complaint deletes reference to section 52-329 in paragraph 4 of the complaint but does not contain a reference to it in the Prayer for Relief paragraph 3. It should be noted further that although reference is made in the amended complaint to section 52-279, 52-280 and 52-304 of the Connecticut General Statute, no argument has been made by the Appellants herein, and it is assumed that all arguments relative thereto are waived by the Appellants.

As stated previously E. and E. J. Pfotzer stated at paragraph 24 of Plaintiffs' Statement in Support of Summary Judgment Motion:

"24. Defendants' use of Sec. 52 281 to replace for Sec. 52-329 garnishment is a continuing or further action under Sec. 52-329 enjoined by this Court in *Lynch*." (Appellants' Appendix 65 a).

The argument of E. and E. J. Pfotzer, Appellants herein at page 15 of their brief that the district court

"disregarded the main thrust of plaintiffs' amended complaint" is not supported by the pleadings presented to the district court by E. and E. J. Pfotzer. The district court therefore had before it at the time of dismissal the claim of E. and E. J. Pfotzer attacking the validity of the hearing before the State court prior to the granting of the second garnishment, which procedure is a state court proceeding which the district court is provisionally restricted from enjoining.

By the authority and jurisdiction granted to the district court under the *Epstein* and *Abele* decisions, the district court determined that a three-judge court was not required, and correctly dismissed the complaint.

> "We therefore hold that, in cases where the state criminal prosecution was begun prior to the federal suit, the same equitable principles relevant to the propriety of an injunction must be taken into consideration by federal district courts in determining a declaratory judgment, and that where an injunction would be impermissible under these principles, declaratory relief should ordinarily be denied as well."
>
> *Samuels* v. *Mackell*, 401 U.S. 66, 73 (1971).

The reasoning and arguments as presented to the Court above are presented as equally applicable to the question of injunction and the question of declaratory judgment.

V.

The 52-329 garnishment was not void ab initio.

The appellants argue (Appellants' Brief page 19) that the first garnishment under 52-329 was void ab initio, and that the second garnishment under 52-281 was obtained in violation of their constitutional rights and therefore invalid. In consequence thereof, the withholding of the funds under the garnishment is without lawful authorization.

The appellants do not present judicial or statutory authority in support of their contention. The appellees are not aware of any controlling judicial or statutory authority in support of appellants' argument.

The issue of the constitutionality of Connecticut General Statute 52-329 was not presented to the federal court prior to the *Lynch* decision. A federal court cannot pronounce any statute, either of a State or of the United States, void because it is irreconcilable with the Constitution of the United States of America, except as it is called upon to adjudge the legal rights of litigants in actual controversy. *Baker* v. *Carr*, 206 F.Supp. 341; *Golden* v. *Zwickler*, 394 U.S. 103. The court was not called upon to make such a decision until the *Lynch* case. The *Lynch* decision did not state that Connecticut General Statute 52-329 or any action taken in reliance upon its validity was and were void ab initio.

The appellees herein obtained the first garnishment under a statute valid at the time they acted, prior to the *Lynch* decision. The appellees herein released the first garnishment prior to the *Lynch* decision. The appellees herein requested the State court for the second or substitute garnishment on the basis that:

"4. Recent decisions rendered in the United States District Courts . . . have raised questions as to whether prejudgment garnishment statutes, similar to the Connecticut General Statutes, violate the due process clause of the Fourteenth Amendment of Constitution of the United States by failing to provide notice and an opportunity for hearing prior to the making of garnishment."

(Motion for Substitute Garnishment, Appellants' Appendix 24a(4)).

The second garnishment was ordered prior to the *Lynch* decision. The first garnishment was obtained under a statute valid at the time and the second garnishment was obtained under a court order validly requested and validly obtained. All prior to the *Lynch* decision.

The appellees herein would point out further that the Memorandum of Decision on Civil Action No. 13,737, rendered January 2, 1973 by Circuit Judge Anderson, referred to herein as the *Lynch* decision, stated that the plaintiff therein represents a class of people "who are subject to Connecticut in personam jurisdiction". E. and E. J. Pfotzer in their complaint and "First Amended Complaint", at paragraph 5, allege that Edmond Pfotzer is a citizen and resident of the State of Vermont and that E. John Pfotzer is a citizen and resident of the State of Delaware (Appellants' Appendix 17a). Therefore, there is a question as to whether the *Lynch* decision (1973) would in fact have been applicable to them as non-residents of the State of Connecticut as persons who are "subject to Connecticut in personam jurisdiction".

Section 52-329 was not void ab initio and, in fact, may not be void even now with respect to non-residents not subject to in personam jurisdiction of the State court.

VI.

No damages should be awarded.

The file in this case indicates that on August 26, 1974, the Petitioner, E. John Pfotzer, advised the Clerk of this Court that the parties, Dorr-Oliver, Inc., Howard Dean, Esq., and Donald J. St. John, Esq., had no further interest in this matter. The City, therefore, remains the only Respondent and as to it only the matter of damages is at issue.

As the City acted, with respect to the first garnishment, upon the belief that it was valid under the then existing law, it is difficult to establish in what way it is liable to Petitioners in damages.

The second garnishment was ordered prior to the *Lynch* decision and after a hearing in the state court in the matter of *Dorr-Oliver, Incorporated* v. *Edmond Pfotzer, et als*, and as *Lynch* did not prescribe the exact procedures required to take a garnishment from within its holding, the City likewise was entitled, in good faith, to rely upon said second garnishment.

As the United States District Judge said in his opinion [Appellants Appendix 6a]:

> "In addition to their claim for injunctive relief, plaintiffs seek damages, but this claim also warrants dismissal. Even if plaintiffs prevailed on the merits of their attack on both garnishments, damages would not be awarded. The defendants obtained the first garnishment under a statute valid at the time they acted, and any infirmity in the second garnishment stems from the alleged inadequacy of the hearing in the state court. Even if the hearing was deficient,

defendants would in no event have to respond in damages for acting in good faith upon a court order they believed they had validly obtained."

It is submitted that this statement is a proper rule with respect to the claim for damages still outstanding in the pleadings in this matter.

CONCLUSION

The judgment of dismissal by the federal district court was not without jurisdiction or authority to do so. The federal district court acted in accordance with sound judicial logic within the confines and limitations of its jurisdiction and authority.

WHEREFORE, the Respondent City respectfully requests that the Petition for Certiorari be denied.

Respectfully submitted,

By .....

ARTHUR J. GOLDBLATT
Corporation Counsel
City Hall, P. O. Box 798
South Norwalk, Connecticut 06856

Attorney for City of Norwalk

Certificate of Service

I hereby certify that all parties required to be served have been served and that on this 15th day of November, 1974, I forwarded by U. S. mail, postage prepaid, three copies of the foregoing Brief to the following: Mr. E. John Pfotzer, P. O. Box 987, Wilmington, Delaware 19899.

.....

ARTHUR J. GOLDBLATT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-110

PFOTZER ET AL V. THE CITY OF NORWALK, MICHAEL WARHOLIC ET AL

SUPPLEMENTAL BRIEF (in accord with Rule 41(5) providing for addition of "late authorities") TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Edmond Pfotzer and
E. John Pfotzer -
Petitioners pro se

P.O. Box 987
Wilmington, Delaware 19899

E. & E. J. PFOTZER

Contractors
Post Office Box 987
Wilmington, Delaware 19899

November 9, 1974

Clerk of the Supreme Court
Supreme Court of the United States
Supreme Court Building
Washington, D.C.

Re: Pfotzer, et al., v. Norwalk & Warholic, et al., No. 74-110 - October Term

Dear Sir:

The recent opinion of the Three Judge Court in Sugar v. Curtis Circulation Company (filed October 17, 1974); Southern District of New York, 74 Civ. 78, opinion No. 41, 322, Feinberg, C. J., Lasker, D. J. opinion by Lasker, D. J., was brought to the undersigned petitioner's attention (after filing of petition herein).

It is respectfully requested that this decision and opinion be brought to the attention of the Justices in their consideration of the petition herein (and nine additional copies of this letter and the subject opinion, supra, are enclosed to facilitate this purpose).

Briefly, the Sugar opinion holds New York's ex parte attachment provisions unconstitutional ". . . to the extent that a New York defendant has no meaningful opportunity to vacate an order of attachment granted ex parte and without prior

notice. ". . . slip opinion, (p.p. 14-15).

Sugar, as here, involved ex parte attachment of the debtor's funds in the hands of a third party;

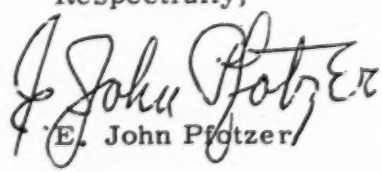
Sugar, as here, involved moneys in which the attaching parties had no property interests (as distinguished by the Sugar Court from the situation in Mitchell v. W. T. Grant Co. (1974), - - - U. S. - - -, 42 U. S. L. W. 4671, where the attaching vendor had an interest in the property sold).

In Sugar, the Court held (slip opinion, p.p. 9-10) a fatal defect existed in the New York provisions for lack of the requirement of a post-seizure hearing at which the attaching party has the burden of proof in establishing grounds on which the attachment issued.

The Sugar Court predicated its holding of unconstitutionality of the ex parte attachment provisions on this Court's holding in Fuentes v. Shevin (1972), 407 U.S. 67 (slip opinion, p.p. 12-13), distinguishing the holding in Mitchell, supra.

Further, it is respectfully submitted that earlier determination in Sugar (--- S.S. ---) 1974 (slip opinion, p.p. 1), by a single judge, that the complaint attacking the constitutionality of the ex parte attachment provisions presented a substantial constitutional question supports the petitioner's claim of error in the case at bar in denial by the Court below of a Three Judge Court herein.

Respectfully,



E. John Pfotzer

CC: Leonard S. Hermann, Esq.
City of Norwalk
City Hall, P.O. Box 798
S. Norwalk, Connecticut 06856

Michael Warholic pro se
P.O. Box 395
S. Norwalk, Connecticut 06856

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BERT RANDOLPH SUGAR and WRESTLING REVUE, INC.,

Plaintiffs,

-against-

CURTIS CIRCULATION COMPANY, CONTINENTAL CASUALTY COMPANY, NATIONAL SPORTS PUBLISHING CORPORATION, JOHN J. McCLOSKEY, SHERIFF OF THE CITY OF NEW YORK, MALCOLM WILSON, GOVERNOR OF THE STATE OF NEW YORK, LOUIS J. LEFKOWITZ, ATTORNEY GENERAL OF THE STATE OF NEW YORK, SIDNEY A. FINE, JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DISTRICT AND GEORGE BEISHEIM, JR., JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, NINTH JUDICIAL DISTRICT,

Defendants.

THREE JUDGE COURT

Honorable Wilfred Feinberg
United States Circuit Judge

Honorable Morris E. Lasker
United States District Judge

Honorable Richard Owen
United States District Judge

This suit attacks the constitutionality of the New York Attachment Statute, CPLR § 6201 et seq., which permits ex parte pre-judgment attachment of the property of a defendant. In particular, it is claimed that CPLR § 6201 (4) (5) and (8), and CPLR § 6211, [1] which collectively allow such attachment upon a plaintiff's ex parte allegation that the defendant has defrauded him, violate the due process clause of the Fourteenth Amendment in depriving the defendant of property without prior notice or hearing. Jurisdiction is alleged under 28 U.S.C. §§ 1331 (a), 1343(3) and (4), 2201, 2202, 2281 and 2284, and plaintiffs seek declaratory and injunctive relief. By an earlier opinion, _____F. Supp._____(1974), a single judge found that the complaint presented a substantial constitutional question under the test of Goosby v. Osser, 409 U.S. 512 (1973) and Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713 (1962). This three judge court was convened to hear the matter pursuant to 28 U.S.C. § 2281 et seq.

I.

Familiarity with the facts set forth in detail in the opinion of the convening judge is assumed. For present purposes it is sufficient to state that in August, 1971 plaintiff Sugar and his controlled corporation, Champion Sports Publishing, Inc. (Champion) contracted with defendant Curtis for the distribution by Curtis of Champion's publications. In the course of their dealings Curtis advanced funds to Champion which it was entitled to recoup under the terms of their agreement.

Sugar's corporate satrapy also included a publisher, Wrestling Revue, Inc., (Wrestling), a

plaintiff here. About a year after the consummation of the Champion-Curtis contract, Curtis learned -- or came to believe -- that it had been defrauded because Wrestling, claiming to own periodicals which Curtis had the right to distribute under the Champion agreement, had contracted to sell some of them to third parties.

Curtis thereupon notified one such third party, National Sports Publishing Corporation (National, a defendant here), that it asserted a claim to moneys payable by National to Wrestling. National's response was to advise Wrestling and Sugar that it was withholding sums payable by National to Wrestling. On March 5, 1973, Wrestling sued National for breach of contract in New York Supreme Court, Westchester County. Subsequent to commencement of the Westchester action, Curtis moved in New York Supreme Court, New York County, without notice to Sugar, Champion or Wrestling, and prior to the filing of a complaint, for an order directing the Sheriff to levy on any property of Sugar, Champion or Wrestling. Curtis' motion, supported by an extensive and detailed affidavit, was based on its claim that:

(a) "Champion Sports has assigned, disposed of or removed property from the State of New York with intent to defraud its creditors"(CPLR § 6201 (4));

(b) "Champion Sports and Sugar, its principal officer, have been guilty of a fraud in contracting or incurring a liablility upon an express contract" (CPLR § 6201 (5)); and

(c) "Champion Sports, Sugar and

Wrestling Revue are liable to Curtis for damages in a cause of action for fraud and deceit" (CPLR § 6201 (8)).

Curtis asserted that it was owed approximately $28,500.00 plus probable interest, Sheriff's fees and expenses. It posted a $10,000.bond to protect Sugar, Champion and Wrestling against the possibility that its claim was not ultimately proven. On April 13, 1973, still prior to Curtis' commencement of suit against Sugar, Champion and Wrestling, and without notice to them, but in accordance with CPLR § 6201 et seq. Mr. Justice Fine granted the order of attachment.

The attachment order and the consequent sheriff's levy on Nation [2] precipitated this suit in which the original roles of the parties are reversed. Sugar and Wrestling are recast as the plaintiffs, while Champion and National are two defendants in a large group including the sheriff and various state officials charged with the enforcement of the statutes under attack.

II.

Although the facts are relatively complex, the issue before us is a narrow one [3] because several recent Supreme Court decisions have dealt with similar statutes. Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); Fuentes v. Shevin, 407 U.S. 67 (1972) and Mitchell v. W. T. Grant Co., 42 U.S.L.W. 4671 (U.S., May 13, 1974).

Prior to Sniadach, decisions of the Court consistently sustained the constitutionality of prejudgment seizure of property subject to litigation, reasoning that ultimate adjudication on the merits would assure a defendant's rights.

See, e.g., Ownbey v. Morgan, 256 U.S. 94 (1921); Coffin Brothers & Co. v. Bennett, 277 U.S. 29 (1928) and, particularly McKay v. McInnes, 279 U.S. 820 (1929) affirming per curiam the constitutionality of a Maine statute which provided for an ex parte order of attachment without requiring a supporting affidavit or plaintiff's bond.[4] Sniadach breached this previously impenetrable wall of authority. At issue in that case was the Wisconsin garnishment statute, which permitted a creditor to require the employer of a defendant alleged to be his debtor to withhold part of the defendant's wages pending final adjudication on the merits. The Court invalidated the statute holding that "absent notice and prior hearing (citation omitted) this prejudgment garnishment procedure violates the fundamental principles of due process." 395 U.S. at 342. In concurrence Mr. Justice Harlan emphasized "that due process is afforded only by the kinds of 'notice; and 'hearing; which are aimed at establishing the validity or at least the probable validity, of the underlying claim against the alleged debtor before he can be deprived of his property or its unrestricted use," 395 U.S. at 343 (emphasis added). Although Sniadach rested on broad principles of due process, its intended impact was carefully limited. As the Mitchell Court later observed:

> "Sniadach involved the prejudgment garnishment of wages -- 'a specialized type of property presenting distinct problems in our economic system.' (citing Sniadach) Because '(t)he leverage of the creditor on the wage earner is enormous' and because 'prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage-

earning family to the wall,' it was held that the Due Process Clause forbade such garnishment absent notice and hearing. Sniadach, 395 U.S. at 341-342. In Sniadach the Court also observed that garnishment was subject to abuse by creditors without valid claims. . . ." 42 U.S.L.W. at pp. 4675-76.

These qualifications limit the significance of Sniadach as a guide to the determination of the issue before us.

The ruling in Fuentes v. Shevin, supra, is much closer to home. Fuentes dealt with the constitutionality of the Florida and Pennsylvania replevin Statutes which, as the Mitchell Court observed,

> ". . . permitted the secured installment seller to repossess the goods sold, without notice or hearing and without judicial order or supervision, but with the help of the sheriff operating under a writ issued by the court clerk at the behest of the seller. Because carried out without notice or opportunity for hearing and without judicial participation, this kind of seizure was held violative of the Due Process Clause." 42 U.S.L.W. at 4676.

Starting from the premise that "a temporary non-final deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment," the Fuentes court broadened the Sniadach rule beyond cases involving the necessities of life, and held that, with limited exceptions, [5] the Due Process Clause requires an opportunity for a hearing prior to a deprivation of property:

> "The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more paticularly, is to protect his use and possession from arbitrary encroachment -- to minimize substantively unfair or mistaken deprivation of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party. So viewed the prohibition against the deprivation of property without due process of law reflects the high value embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference." 407 U.S. at 80-81.

Lower courts generally construed Fuentes to hold that, with the exceptions already noted, [6] statutes permitting pre-judgment seizure of property without prior notice were at best suspect and at worst unconstitutional; accordingly Fuentes toppled a variety of state replevin statutes and similar provisions permitting such ex parte seizures. That case, however, is not the final word on the constitutional adequacy of pre-jedgment ex parte seizure of property. In Mitchell the Court seriously narrowed the impact of Fuentes -- so seriously

indeed that Justices Powell and Brennen believed the majority to have overruled Fuentes. Mitchell, like Fuentes, involved a Louisiana statute authorizing ex parte prejudgment seizure of property subject to a vendor's lien. However, the Court found constitutionally significant differences between the Florida and Pennsylvania statutes at issue in Fuentes and the Louisiana law before it, whose validity it sustained. The issue before us, therefore, is whether the New York provisions, CPLR §§ 6201 (4), (5) and (8) and § 6211, squeeze through the narrow door of constitutionality left open in Mitchell, or remain out in the unconstitutional territory charted in Fuentes.

Mitchell found several procedural assurances which critically distinguished the Louisiana statute from the Florida and Pennsylvania provisions in Fuentes: (1) judicial approval of the sequestration order was required; (2) the grounds for sequestration had to be clearly demonstrated in the affidavit supporting the writ; (3) the attaching creditor was obliged to post a bond; (4) the buyer (debtor) had the right to regain possession of his property by posting a bond and finally, (5) the statute "entitles the debtor immediately (after sequestration) to seek dissolution of the writ, which must be ordered unless the creditor 'proves the grounds upon which the writ issued', Art. 3506, the existence of the debt, lien and delinquency, failing which the court may order return of the property and assess damages in favor of the debtor, including attorney's fees." Mitchell, 42 U.S.L.W. at 4673.

III.

There is no doubt that, as Curtis argues here, there are substantial parallels between the pertinent CPLR provisions and the Louisiana

provisions upheld in Mitchell: New York law (CPLR § 6219a) meets Mitchell's requirements that an attachment order be subject to judicial approval and based on a showing by affidavit that there is a cause of action and establishing one or more grounds for issuance of an order of attachment. Like the creditor in Mitchell, moreover, a New York creditor must post a bond to indemnify the defendant-debtor against damages and fees in the event that the attachment is ultimately proven to have been unjustified (CPLR § 6212 (b)). Finally, the New York statute; like the Louisiana statute, enables the debtor-defendant to regain possession of his attached property by posting a bond, CPLR § 6222. Taken together, therefore, the New York provisions contain all but one of the indices which led the Mitchell court to find the Louisiana statute constitutional.

Unlike the Louisiana statute, however, theNew York provisions do not grant the debtor-defendant an immediate post-seizure hearing at which the creditor-plaintiff must prove the grounds "upon which the writ issued." (42 U.S.L.W. at 4673.)

We find that the opportunity for such a hearing was critical to the holding in Mitchell, and that its absence renders New York's statute fatally defective.

IV.

It is true that under the New York law a defendant has the right to move to vacate the attachment. Section 6223 of the statute provides in pertinent part:

> "Prior to the application of property or debt to the satisfaction of a

> judgment, the defendant . . . may move, on notice to each party and the Sheriff, for an order vacating . . . the order of attachment . . . If, after the defendant has appeared in the action, the court determines that the attachment is unecessary to the security of the plaintiff, it shall vacate the order of attachment." (emphases added)

There are several reasons why § 6223 -- the sole mechanism available to a defendant who seeks dissolution of the attachment -- does not meet the standards of the Mitchell - Louisiana statute which provided in straightforward language (Article 3506, Louisiana Code of Civil Procedure): "The defendant by contradictory motion may obtain the dissolution of a writ of attachment or of sequestration unless the plaintiff proves the grounds upon which the writ was issued." (emphasis added)

By its terms, that is, the Louisiana law required that the attachment be vacated unless the grounds upon which it was issued are proven, and imposed the burden of such proof on the creditor.

The New York Statute affords neither protection. The sole basis for vacating the attachment under the CPLR is not that the grounds upon which it has been issued are unproven, but rather that the attachment "is unnecessary to the security of the plaintiff"; and the burden of proof is not, as in Mitchell, on the plaintiff, but on the defendant.

That this is not too narrow or literal a reading of the language of 6223 is resoundingly confirmed by numerous holdings of the New York

courts. Without exception they have ruled -- for at least 50 years -- that an attachment may not be vacated under § 6223 or its predecessors unless the papers upon which the attachment was based "clearly indicate that the plaintiffs must ultimately fail." Wulfsohn v. Russian Socialist Federated Soviet Republic, 234 N.Y. 372, 377 (1923). The burden is on the defendant to establish that the plaintiff cannot succeed, Bard-Parker Co. v. Dictagraph Products Co., 258 App. Div. 638, 17 N.Y.S. 2d 588 (1st Dept. 1940); and to demonstrate that the plaintiff has not established a cause of action which permits attachment, American Reserve Ins. Co. v. China Ins. Co., 297 N.Y. 322, 325 (1948); and to establish that the attachment is unnecessary for the security of the plaintiff, Hydromar Corp. of Delaware v. Construction Aggregates Corp., 32 A.D. 2d 749, 300 N.Y.S. 2d 797 (1st Dept. 1969); George A. Fuller Co. v. Vitro Corp. of America, 26 A.D. 2d 916, 274 N.Y.S. 2d 600 (1st Dept. 1966). See also B.B. Weit Printing Co., Inc. v. Frances Denney, Inc., 300 F. Supp. 405, 408 (S.D.N.Y. 1969).

Indeed under the decisions of New York courts, the merits of the action are irrelevant on a motion to vacate the attachment under § 6223 -- a construction which we believe is proper in the light of the strictly limited wording of the law. Kneapler v. Braufman, 266 App. Div. 756, 41 N.Y.S. 2d 261 (2d Dept. 1943); Bard-Parker Co., Inc. v. Dictagraph Products Co., supra. As Judge Motley put it in Marklin v. Drew Properties Corp. 280 F. Supp. 176, at 179 (S.D.N.Y. 1967):

> "Under the law of New York it is settled that *** the court should not attempt to decide in advance the merits of the controversy by vacating the attachment unless the complaint and affidavits clearly indicate that the plaintiff must ultimate(sic) fail." (emphasis in original)

These considerations alone would be dispositive; but we believe that there are other significant distinctions which place the case at hand within the Fuentes rather than the Mitchell zone.

First, the plaintiff-creditor in Mitchell had by virtue of a vendor's lien an actual possessory interest in the attached property, a fact the Court thought significant:

> "Plainly enough, this is not a case where the property sequestered by the court is exclusively the property of the defendant debtor. The question is not whether a debtor's property may be seized by his creditors, pendente lite, where they hold no present interest in the property sought to be seized. The reality is that both seller and buyer had current, real interests in the property . . ." 42 U.S.L.W. at 4672-73.

In the case at hand, Curtis has never had a legally cognizable, concurrent possessory interest in the property which it attached; it had only its claim of fraud against Wrestling, Sugar and Champion.

Second, in Mitchell the sole issues before the Louisiana court which granted the sequestration order were "the existence of the debt, the lien and the delinquency." As the Supreme Court commented, "These are ordinarily uncomplicated matters that lend themselves to documentary proof," 42 U.S.L.W. at 4674, ". . . documentary proof is particularly suited for questions of the existence of a vendor's lien and the issue of default." 42 U.S.L.W. at 4674 and 4677.

Here, on the other hand, the issue before the state court considering the issuance of the attachment order was whether Sugar, Champion and Wrestling had defrauded Curtis. The Supreme Court itself has emphasized that such issues, which involve determination of subjective elements of motive and intent, are notably unsuitable to determination on documentary proof alone. Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962). Indeed, the Mitchell court relied upon this principle in distinguishing the facts before it from those present in Fuentes:

> "As in Bell v. Burson, supra, where a driver's license was suspended without a hearing, when the suspension was promised on a fault standard, see Vlandis v. Kline, 412 U.S. 441, 446-7 (1973), in Fuentes this fault standard was thought ill suited for preliminary ex-parte determination." 42 U.S.L.W. at 4677.

questions of fraud alleged by Curtis in its motion for attachment are equally "ill-suited" for preliminary ex parte determination particularly where, as here, the critical allegations of fraud, however detailed, are based on information and belief.[7]

For the reasons described we find the challenged provisions unconstitutional to the extent that a New York defendant has no meaningful opportunity to vacate an order of attachment granted ex parte and without prior notice. In so holding, we are guided both by the broad rule announced in Fuentes and Mitchell's insistence on the continued vitality of that rule. In particular, we find that the distinctive procedural features found in Mitchell to validate the Louisiana statute are critically incomplete in the New York scheme as construed by the New York courts.

Settle order on notice.

Dated: New York, New York
October 17th, 1974.

/s/ Wilfred Feinberg C.J.

/s/ Morris E. Lasker D.J.

/s/ Richard Owen D.J.

FOOTNOTES

1. § 6201. Grounds for attachment

An order of attachment may be granted in any action, except a matrimonial action, where the plaintiff has demanded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants, when:

4. the defendant, with intent to defraud his creditors, has assigned, disposed of or secreted property, or removed if from the state or is about to do any of these acts; or

5. the defendant, in an action upon a contract, express or implied, has been guilty of a fraud in contracting or incurring the liability; or

8. there is a cause of action to recover damages for the conversion of personal property, or for fraud or deceit.

§ 6211. Order of attachment

An order of attachment may be granted without notice, before or after service of summons and at any time prior to judgment. It shall specify the amount of the plaintiff's demand, be indorsed with the name and address of the plaintiff's attorney and shall be directed to the sheriff of any county or of the city of New York where any property in which the defendant has an interest is located or where a garnishee may be served.

The order shall direct the sheriff to levy within his jurisdiction, at any time before final judgment, upon such property in which the defendant has an interest and upon such debts owing to the defendant as will satisfy the plaintiff's demand together with probable interest, costs, and sheriff's fees and expenses.

2. In accordance with the sheriff's levy, National paid to the sheriff the moneys which it then owed Wrestling, and it has continued to pay further sums as they accrue. It has also paid the sheriff the sum of $124.17, which it owed to Sugar and which Sugar denominates "wages," whose attachment Sugar claims to violate his due process rights under Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). The plaintiffs here claim further violation of their due process rights in that the second sheriff's levy was extended without prior notice or hearing in December, 1973 and April, 1974, for a period to expire March 24, 1975, notwithstanding the facts that Curtis had commenced its action against them, and they had interposed answers denying liability.

3. As a three judge court convened pursuant to 28 U.S.C. § 2281 et seq., we here deal only with the constitutionality of the statute. The earlier decision of the single judge determined that plaintiffs have standing to use, have not waived their right to assert the constitutional claim here, and that the pendency in state court of the earlier actions does not bar this action.

4. The Maine statute was declared unconstitutional by a unanimous three judge court (Coffin, Circuit Judge and Gignoux and Bownes, District Judges) which relied on Sniadach and Fuentes. Gunter v. Merchants Warren National Bank, 360 F. Supp. 1085 (D. Me. 1973). The Massachusetts attachment statute, on which the Maine Act had been modelled, was declared unconstitutional in Schnider v. Margossian, 349 F. Supp. 741 (D. Mass. 1972) by a unanimous three judge court (Coffin, Circuit Judge, and Gignoux and Garrity, District Judges) relying on the same cases.

5. The exceptions included cases in which attachment might be necessary (1) to acquire jurisdiction of the defendant; (2) "to protect the public against (some) sort of immediate harm "where it is necessary to secure an important governmental or public interest (and) there has been a special need for very prompt action." 407 U.S. at 91; or (3) to guard against the demonstrated possiblity that the alleged debtor will destroy or conceal disputed goods. 407 U.S. at 93. None of these considerations apply in the case at hand.

6. Even before Fuentes, a number of summary prejudgment statutes had been declared unconstitutional on the authority of Sniadach. See citations in Fuentes, 407 U.S. at 72, note 5. The cases include the decision of a three judge court convened in the Northern District of New York declaring unconstitutional the New York replevin statute. Laprease v.

aymours Furniture Co., 315 F. Supp. 716 (N.D.N.Y. 1970). That statute provided for search and seizure of chattels by the sheriff upon filing of an affidavit and undertaking by the plaintiff, and without prior notice to the defendant or court order. The statute, subsequently cured by amendment, now requires as conditions to the seizure a court order and service by the sheriff of a copy of such order on the possessor of the chattel. CPLR § 7102 (b) (d) (1971).

7. Affidavit of Stewart J. Friedman, Paragraphs 5 through 8 inclusive, at pages 84-5 of plaintiff's appendix.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-110

PFOTZER ET AL v. THE CITY OF NORWALK

MICHAEL WARHOLIC ET AL

REPLY BRIEF (as provided by Rule 41(3)) to respondent's "BRIEF IN OPPOSITION FOR A PETITION OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT."

Edmond Pfotzer and
E. John Pfotzer
Petitioners pro se

P.O. Box 987
Wilmington, Delaware 19899

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-110

REPLY BRIEF

STATEMENT

Petitioners respectfully submit this Reply Brief in reply to brief of respondent, the City of Norwalk.

ARGUMENT

Respondent clearly concedes, now, disputed Section 52-329 of the Connecticut General Statutes was unconstitutional and that the petitioner's request for a three judge court in respect thereto presented a substantial Federal question and (that a basis for a three judge court probably existed)

It is respectfully submitted that petitioner's arguments in respect to the other statutes attacked as unconstitutional, and most especially in regard to Section 52-281 of the Connecticut General Statutes, equally present a substantial Federal question and a basis for a three judge court, particularly when supported by the Second Circuit opinion in Sugar v. Curtis (filed October 7, 1974), Three Judge Court, Southern District of New York, 74 Civ. 78, Opinion No. 41322.

In Sugar, it is noted that the Second Circuit, found it to be a fatal defect that the subject New York statute did not provide for a post-attachment hearing at which the plaintiff would have the burden of establishing the validity of the garnishment or attachment.

The same fatal defect being present in Connecticut General Statute Section 52-281, upon which respondent (and its co-defendants) relie l for a so-called substitute attachment, it is respectfully submitted that the Sugar holding is equally applicable to the case at bar and that the subject Connecticut General Statute, Section 52-281, is tainted with the same fatal defect as the New York statute in Sugar, supra.

It follows, therefor, that if a substantial Federal court can mandate a three judge court is involved in determination of the constitutional invalidity of Section 52-329 and, as in Sugar, the relevant New York statute, and the conditions precedent for a three judge court and for determination of the substantial Federal question presented by Connecticut General Statute Section 52-281 is equally present herein.

Respondent's Point 2 is substantially in misconstruing petitioner's position, which at all times sought to establish an illegal detention of petitioner's property without due process of law, which illegal detention was predicated by respondent and its co-defendants on unconstitutionally void state statutes.

Respondent's argument (on pages 11-12) attempts to over-rule the effect of Mitchum v. Foster (1972), 407 US 225 which totally excepted Section 1983 Civil Rights actions from the anti-injunction impact of 28 USC 2283, and respondent argues injunction against this 1983 action herein, although it quotes from Mitchum.

On page 13 of respondent's brief, it attempts to support its position that petitioners have not made a showing of irreparable injury by the illegal detention of their funds, thus ignoring that petitioners loss of use of virtually all its funds (following the settlement of its large accounts payable - exclusive of large loans - as subsequent to the City of Norwalk's partial payment of the judgment of $246,788.10 as obtained against it and others) over a period from November 19, 1971 to 1974 (when petitioners settled with co-defendant Dorr-Oliver); and City's withholding of full payment of judgment culminated in petitioners being forced out of their construction business, and which forseeable consequence constitutes irreparable injury to petitioners.

Respondent's argument, therefor on the applicability of 28 USC 2283 runs counter to respondent's own concession in its brief that, clearly, in attacking Section 52-329, of the Connecticut General Statutes, petitioners were presenting a substantial Federal question and were entitled to a three judge court, and its 2283 argument also runs counter to the decision in Sugar, supra, as well as this Court's holding in Mitchum.

Respondent's final argument, under Point IV, seem to take the position that because one Judge can decide whether or not a three judge court is proper, that decision is not reversible where there is error in the decision by the one judge court.

Obviously, if the one judge court, in fact, erroneously decides the question of whether or not a substantial Federal question is presented and whether or not a three judge court is proper, that decision is reviewable.

CONCLUSION

Wherefore, plaintiffs respectfully submit that the petition for certiorari herein ought to be granted.

Respectfully submitted,

E. JOHN PFOTZER

and

EDMOND PFOTZER

Petitioners pro se

Edmond Pfotzer

E. John Pfotzer